

Advisory Action Before the Filing of an Appeal Brief	Application No. 09/779,560	Applicant(s) HARBOE, MARIANNE	
	Examiner David J. Steadman	Art Unit 1656	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 26 October 2010 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
 b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
 (a) ☒ They raise new issues that would require further consideration and/or search (see NOTE below);
 (b) ☐ They raise the issue of new matter (see NOTE below);
 (c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
 (d) ☒ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: See Continuation Sheet. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
 5. ☐ Applicant's reply has overcome the following rejection(s): _____.
 6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
 7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
 The status of the claim(s) is (or will be) as follows:
 Claim(s) allowed: _____.
 Claim(s) objected to: _____.
 Claim(s) rejected: 44-78.
 Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
 9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
 10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
 12. ☐ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). _____.
 13. ☒ Other: PTO-892, "Notice of References Cited".

/David J. Steadman/
 Primary Examiner, Art Unit 1656

Continuation of 3. NOTE: While the proposed amendment to claims, filed on 10/26/10 would appear to obviate the outstanding rejections under 35 U.S.C. 112, first paragraph, the amendment has not been entered because it requires further consideration. See MPEP 714.13.III. The proposed amendment to claim 44 deletes the species "lactic acid" with the species "acetic acid", "propionic acid", and "citric acid" remaining. The proposed amendment would necessitate further consideration because Lawlis teaches using an organic acid at a pH of two pH units below the organic acid's pKa, citric acid is an organic acid with a pKa of 3.13 (see, e.g., Evangelista et al., J. Chromatography 745:273-280, 1996 and CRC Handbook of Chemistry and Physics, 77th Ed., edited by Lide, DR, New York, CRC Press, 1997), and two pH units below the pKa of citric acid is 1.13, which is encompassed by claim 44.

Continuation of 11. does NOT place the application in condition for allowance because: Applicant's proposed amendment and accompanying arguments filed on 10/26/10 have been fully considered, however, do not place the application in condition for allowance in view of the non-entry of the amendment. In the interest of compact prosecution, it is noted that even if the amendment was entered, the rejections under 35 U.S.C. 103(a) would likely be maintained. With respect to lactic acid, applicant argues the pKa of lactic acid is 3.86 and one would not have been motivated to lower the pH to a value within the recited range. However, as noted in prior Office actions, at the time of the invention the pKa for lactic acid was known to be 3.06 as shown by a 1997 edition of CRC Handbook (CRC Handbook of Chemistry and Physics, 77th Ed., edited by Lide, D., New York, CRC Press, 1997). With respect to formic acid (pKa = 3.75) and acetic acid (pKa = 4.76), applicant argues the prior art provides no reason to lower the pH to a value within the recited range. However, Lawlis expressly teaches lowering the pH to 2 pH units "or less" below the pKa.